SUPREME COURT, U. S.
CORRECTED COPY

FILED
AUG 11 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 480

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Oklahoma City, Oklahoma

and

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Washington, D. C.

Attorneys for Petitioner

of Counsel:

GEORGE AND KENAN
SHIPLEY, AKERMAN & PICKETT

August, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on March 24, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is not reported. The order of November 1, 1966, of Judge Chandler, stayed by the Court of Appeals, together with his explanatory letter of November 21, 1966, to counsel, are printed as Exhibits A and B, respectively, of the Appendix.

JURISDICTION

The order of the Court of Appeals was entered on March 24, 1967. This Court granted on June 26, 1967 and on July 12, 1967 extensions of time until August 12, 1967 within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are district judges authorized by Rule 53(b), Federal Rules of Civil Procedure, in a non-jury action involving primarily matters of account, to refer the action to a master without a showing that some exceptional condition requires it?

2. In the circumstances just stated, are the Courts of Appeals authorized to invoke the extraordinary powers of the All Writs Act, 28 U.S.C., Section 1651, without a finding first that exceptional circumstances are present?

3. Does *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), make the All Writs Act the routine remedy for striking down a district judge's improper reference to a master, or is it still necessary to prove exceptional circumstances to justify a Court of Appeals' use of such powers?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C., Section 1292; 28 U.S.C., Section 1651; and Rule 53(b), Federal Rules of Civil Procedure. They are set forth in the Appendix, Exhibit G.

STATEMENT OF THE CASE

This matter arose during the course of a federal income tax refund proceeding in the United States District Court for the Western District of Oklahoma, in which Judge Chandler was sitting.

In addition to a few legal questions raised, the proceeding involved the inspection of the taxpayers' accounts and books for a five-year period, the pouring over of voluminous records, invoices, and thousands of check stubs, as well as the computation of depreciation for hundreds of items. After efforts had failed to get the parties and their accountants to agree on the matters of account involved, Judge Chandler, on April 19, 1966, during a pretrial conference with all counsel, advised such counsel that he was considering referring to a special master all or part of the trial of the case.

On May 25, 1966, defendant United States of America filed its Objection to Reference of This Case to a Master (Appendix, Exhibit C).

On July 25, 1966, plaintiffs filed their Response to Objections to Appointment of Special Master (Appendix, Exhibit D).

After considering the wishes and positions of the parties with respect to the appointment of a special master, Judge Chandler filed an order on November 1, 1966 appointing a special master (Appendix, Exhibit A). While the order of reference itself was broad in its specification of powers, the motivation for Judge Chandler's reference was clearly understood by all parties to be to clear the thicket of the thousands of matters purely of account and

bookkeeping before moving to the resolution of the action. (See the arguments of both counsel in the Appendix, Exhibits C and D, and Judge Chandler's letter of November 21, 1966 to the defendant's counsel, in Appendix, Exhibit B.

Defendant United States petitioned the Court of Appeals for the Tenth Circuit for a writ of mandamus under the All Writs Act and for a stay of the proceedings that were to be held before the special master. No exceptional circumstances were alleged in the petition to justify the Court of Appeals' invoking the extraordinary powers of the All Writs Act. The petition relied upon *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), as authority for the proposition that the All Writs Act may be routinely resorted to by the Courts of Appeals to strike down a district judge's improper reference to a master. The petition argued that Judge Chandler's reference was improper under Rule 53(b) on the ground that no "exceptional condition required it." On December 2, 1966, the Court of Appeals ordered a stay of all proceedings that were to be held before the special master, pending action by such Court on the petition for a writ of mandamus (Appendix, Exhibit E). On March 24, 1967, the Court of Appeals issued an order making permanent, such stay order (Appendix, Exhibit F).

REASONS FOR ALLOWANCE OF THE WRIT

The action of the Court of Appeals has decided an important question in the interpretation and administration of the Federal Rules of Civil Procedure, which question has not been, but should be, settled by this Court.

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957), held that, under exceptional circumstances, the All Writs Act empowers a Court of Appeals to issue a writ of mandamus to compel a district judge to vacate his orders, entered under Rule 53(b), referring an antitrust case for trial before a special master. The district judge's referral in *La Buy* was based upon the judge's belief that there were present "exceptional conditions requiring it," within the meaning of the following language of Rule 53(b):

> ". . . in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

Judge Chandler's referral to a special master was based upon different language in Rule 53(b), the language which exempts from the necessity of exceptional conditions those referrals involving "matters of account."

The application of *LaBuy* to the present case breaks new ground. The *La Buy* decision was based upon (1) a finding of "exceptional circumstances" that the district judge, though thoroughly qualified and thoroughly informed with respect to the facts of the litigation, was abdicating the judicial function by refusing to try the case himself, and (2) a finding that there were no "exceptional conditions" requiring the referral under Rule 53(b), as contended by the district judge. Neither of these findings are present in the instant case. It was not even argued to the Court of Appeals that Judge Chandler was seeking to evade his judicial duties, and Judge Chandler relies not upon "exceptional conditions" but upon the clear language of Rule 53(b) that authorizes referrals in matters of ac-

count without a showing of exceptional conditions. The dramatic extension of *La Buy* to Judge Chandler's referral is of such great importance to all district judges that its propriety should be passed upon by this Court.

ARGUMENT

In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), this Court held, in a 5 to 4 decision, that a Court of Appeals need not await the final decision of a district court to review an interlocutory order not qualifying under 28 U.S.C., Section 1292, but that it can proceed under the All Writs Act, 28 U.S.C., Section 1651, if "exceptional circumstances" exist. The "exceptional circumstances" found in *La Buy* were facts suggesting the complete abdication of the judicial function by the district judge: the refusal to judge even when fully informed and when qualified technically in a difficult area of law.

In the Court of Appeals, the district judge in *La Buy* opposed the application for a writ of mandamus by alleging "exceptional conditions," as set forth in Rule 53(b). This Court found that there were no "exceptional conditions," within the terms of Rule 53(b) but that, instead, there were "exceptional circumstances" within the meaning of the All Writs Act.

In the instant case, when the United States applied to the Court of Appeals for a writ of mandamus and a stay, it failed to allege and prove "exceptional circumstances" within the meaning of the All Writs Act. It alleged, rather, that there were present no "exceptional conditions" within the meaning of Rule 53(b), and it relied

upon *La Buy* as authority for the startling proposition that a writ of mandamus under the All Writs Act is the "appropriate remedy to vacate an improper order of reference."

It is one thing for this Court to find, as it did in *La Buy*, that circumstances amounting to an abdication of the judicial function by a judge are so exceptional as to support mandamus action under the All Writs Act. It is another thing to utilize *La Buy* as the departure point for new doctrine which asserts (1) no exceptional circumstances need be alleged or proved to invoke the All Writs Act in cases involving references to masters, and (2) an order of reference, only if merely improper, is subject to mandamus action under the All Writs Act.

This Court surely never intended its decision in *La Buy* to be so construed. Yet, it must have been by the Court of Appeals for the Tenth Circuit. While the orders of the Court of Appeals (Appendix, Exhibits E and F) are too cryptic to reveal that court's reasons for acting, we must assume the court confined itself to the matters and issues presented to it. An examination of the "Petition for a Writ of Mandamus and for Stay of Proceedings" quickly reveals that it is based upon the notion that *La Buy* makes routine the invoking of All Writs Act powers when a district judge improperly orders a reference to a master.

The only matter involving Rule 53(b) possibly at issue before the Court of Appeals was whether "matters of account" were involved. While it would seem obvious that sifting through five years of accounting books, invoices and check stubs and running endlessly through the tables of depreciation would qualify as "matters of ac-

count," it is submitted that an error in this respect by Judge Chandler is still not reviewable under the All Writs Act *in the absence of any showing of "exceptional circumstances,"* as required by *La Buy*. The extraordinary writs do not reach to cases involving only an interlocutory order incorrectly issued. They cannot be used to thwart the congressional policy against piecemeal appeals. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943), and the Separate Opinion, dissenting, in *La Buy* and the cases cited therein.

Finally, it should be noted that there is no requirement in Rule 53(b) for a showing that "some exceptional condition requires" the reference of a proceeding to a master when it involves matters of account. The Rule is clear:

> ". . . in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional conditions requires it."

The argument of the United States, in its petition to the Court of Appeals for a writ of mandamus, that no "exceptional condition" required Judge Chandler's reference is a pointless argument, made necessary neither by Rule 53(b) nor by *La Buy*.

Judge Chandler's reference to a master was fully authorized by Rule 53(b). The United States alleged and proved neither that the reference did not qualify under Rule 53(b) nor that independent "exceptional circumstances" existed to justify the use of the extraordinary powers of the All Writs Act. The Court of Appeals improperly extended the doctrine of *La Buy* to this case.

CONCLUSION

The Court of Appeals' action in invoking the extraordinary powers of 28 U.S.C., Section 1651, the All Writs Act, was not authorized. No "exceptional circumstances" were alleged or proved as required by the Act and *La Buy*.

Rule 53(b) authorizes the reference of a case to a master "in matters of account" without a showing of "exceptional conditions." This is a reference involving "matters of account." The argument of the United States of America, that no "exceptional conditions" are present, is not to the point.

At most, the Court of Appeals' action could be justified only by a finding that this case does not involve "matters of account." Yet, prima facia, it does involve matters of account. Any error in this respect by Judge Chandler is not one of the appealable interlocutory orders set forth in 28 U.S.C., Section 1292.

La Buy v. *Howes Leather Co.*, was never intended by this Court to make the All Writs Act the standard and routine remedy for any interlocutory order incorrectly issued by a district court, much less an order prima facia authorized by Rule 53(b) and issued under normal and non-exceptional circumstances.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

THOMAS J. KENAN
1366 First National Building
Oklahoma City, Oklahoma

and

CARL L. SHIPLEY
1204 National Press Building
Washington, D. C.

Attorneys for Petitioner

of Counsel:

GEORGE AND KENAN
SHIPLEY, AKERMAN & PICKETT

August, 1967

APPENDIX

EXHIBIT A

FILED
Nov 1 1966
VERA L. HOWARD
CLERK U. S. DISTRICT COURT
BY (signature illegible)
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT O. BURBRIDGE, and VELMA J. BURBRIDGE	)	
	)	CASE NO.
Plaintiffs,	)	9404-Civil
VS.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER APPOINTING SPECIAL MASTER AND REFERRING CAUSE

Pursuant to the pretrial proceedings on October 24, 1966

IT IS ORDERED that Richard G. Taft is hereby appointed Special Master in the above entitled matter and it is further ordered that this case be referred to Richard G. Taft of Oklahoma City, Oklahoma, as Special Master to hear the parties and their evidence and to report to the Court his findings of fact and conclusions thereon together with such parts of the evidence as any party may request in writing, with full powers to require the attendance of witnesses and all other powers provided by the applicable statutes and rules.

[APPENDIX]

IT IS FURTHER ORDERED that the compensation of the Special Master be fixed at the rate of $200.00 for a day of seven (7) hours, to be taxed as costs herein.

(signed) Stephen S. Chandler
UNITED STATES DISTRICT JUDGE

EXHIBIT B

FILED
Nov 21 1966
VERA L. HOWARD
CLERK U. S. DISTRICT COURT
BY Josephine P. Gore
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CHAMBERS OF
STEPHEN S. CHANDLER
CHIEF JUDGE

OKLAHOMA CITY 1

November 21, 1966

Mr. Robert L. Waters
Attorney, Tax Division
Department of Justice
416-422 United States Courthouse
Fort Worth, Texas 76102

Re: No. 9404-Civil
Robert O. Burbridge, et ux. vs.
United States
(MR:RLWaters:csq 5-60-985)

Dear Mr. Waters:

I have before me your letter dated November 10th asking that I amend my Order entered and filed November 1, 1966, Appointing Special Master. The Order was entered pursuant to pretrial proceedings held on October

24, 1966, at which time the Court advised counsel that a Special Master would be appointed in order to expedite the case since it involved predominantly the auditing of several years' bookkeeping and accounting records and procedures.

Under date of May 25, 1966, Mr. White, who was handling this case for defendant at that time, filed an Objection to Reference after it had been suggested at pretrial on April 19, 1966, that disposition of the case might be expedited thereby. While Mr. Jones stated at the pretrial on October 24th that the Government was still objecting to the appointment of a Special Master, the Court overruled the objection and advised that a Special Master would be appointed to hear the case beginning December 5, 1966, which date was fixed as being a date convenient for counsel for both parties.

The Order Appointing the Special Master and referring the cause did not contain the statement required by §1292(b) that the Court was "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", for the reason that I was of the opinion and so stated that in my opinion Rule 53(b) specifically authorized the appointment of a Special Master in a case involving matters of account, and that while I believed this case exceptional in the sense that it is peculiarly appropriate for initial disposition by a qualified Special Master rather than of the nature requiring the exercise of a court's own decisional function in the first instance, that nevertheless my decision was based solely upon the ground that the case involved predominantly matters of accounting, would be materially expedited by the appointment of a Special Master qualified to hear, understand and report to the Court his conclusions based upon said accounting evidence.

[APPENDIX]

While I do not consider the request made in your letter, dated November 10th, as being timely, nevertheless I have carefully reconsidered the objections and briefs and am of the opinion that Rule 53(b) clearly authorizes the appointment of a master in matters predominantly involving accounting, such as that involved here, and that such reference will expedite the disposition of this matter and minimize the chance of error by the Court.

This case was several times stricken from the Trial Docket by agreement of counsel pending settlement and has now grown very old. Counsel some time ago advised me that there was now no possibility of settlement. Plaintiff has asked for speedy trial and on October 24th the matter was set for trial on December 5th, a date fixed by the Court for the convenience of counsel for both parties. For this reason I believe it would be improper for me to stay proceedings as requested by the Motion filed today as this would necessitate the striking of the case from the trial docket for December 5th.

Under the circumstances I feel it my duty to and do hereby deny the defendant's request to certify the case for appeal under Section 1292(b) and defendant's Motion to Stay Proceedings. Copies of the Orders entered are enclosed.

With kind regards,

(signed) Stephen S. Chandler
Stephen S. Chandler

CC: Mr. Gus Rinehart
First National Bldg.
Oklahoma City, Oklahoma

EXHIBIT C

FILED
May 25 1966
VERA L. HOWARD
CLERK U. S. DISTRICT COURT
BY (signature illegible)
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT O. BURBRIDGE and VELMA J. BURBRIDGE, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 9404
UNITED STATES OF AMERICA, Defendant	)	

DEFENDANT'S OBJECTION TO REFERENCE OF THIS CASE TO A MASTER

Defendant, by and through B. Andrew Potter, United States Attorney for the Western District of Oklahoma, hereby objects to the Court's proposed reference of all or any part of the trial of this captioned case to a master. In support of this objection, defendant respectfully shows the Court as follows:

1. At the pretrial of this captioned case, the Court instructed counsel to arrange for a meeting between themselves and their respective accountants in an effort to work out certain problems of proof herein. Counsel for plaintiff was to arrange the meeting and, as of yet, this has not been done. At the pretrial, the Court indicated that if counsel and their accountants could not agree as to certain facts, then the Court would consider referring all or part of the trial of the captioned case to a master. Although

counsel have not met and attempted to work out the evidentiary problems, defendant nevertheless desires to apprise the Court that it believes this captioned case should not be referred to a master for trial in whole or in part, and takes this opportunity to apprise the Court of its objections to reference to a master.

2. Rule 53(b) of the Federal Rules of Civil Procedure provides for the circumstances in which a case may be referred by the Court to a master. The substance of Rule 53(b) is that the reference of the case by the Court to a master "shall be the exception and not the rule", and that in non-jury cases, save in matters of account, "a reference shall be made only upon a showing that some exceptional condition requires it."

3. The instant non-jury case involves a problem of determining whether plaintiffs are entitled to a refund of federal income taxes, as they demand, or entitled to no refund, as the Government contends. There are no exceptional conditions involved in the instant case which would necessitate or justify reference of the trial of the captioned case or any part thereof to a master.

4. Further support for defendant's objection is found in a memorandum of points and authorities which is attached hereto and made a part hereof.

WHEREFORE, it is prayed that this objection to the reference of this case to a master be sustained and that the Court proceed, itself, to try the case.

B. ANDREW POTTER
United States Attorney

By:
(signed) Robert I. White
ROBERT I. WHITE
Attorney, Tax Division
Department of Justice
416-422 U. S. Court House
Fort Worth, Texas 76102

EXHIBIT D

FILED
Jul 25 1966
VERA L. HOWARD
CLERK U. S. DISTRICT COURT
BY Zita M. Cowan
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT O. BURBRIDGE and VELMA J. BURBRIDGE,	)	
Plaintiffs,	)	No. 9404-Civil.
-vs-	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

RESPONSE TO OBJECTIONS TO APPOINTMENT OF SPECIAL MASTER

It was plaintiffs' understanding we had an agreement with the Government at the pre-trial hearing that we would jointly ask the Judge to appoint a special master with reference to the loss we are claiming advantage for, to save the Court's time on the accounting features of the case. We claim a loss in 1949 when Burbridge went into bankruptcy, the inventory depreciated, and a loss sustained. We seek to carry this forward as a tax deduction in 1950 and 1951. The Government denies there was a loss, and claims that we had more loss in 1947 and 1948 than was shown by our tax returns. There is involved four or five years' bookkeeping and accounting. There was some discussion of settlement which has now been abandoned by the Government. It would take two or three weeks of the Court's time to examine the exhibits. It will save this

time to let a special master make the accounting and report on it.

Rule 53 says special masters shall be the exception, save in matters of accounting. In *American Cyanamid Company* v. *Ellis-Foster Company,* 298 F.2d 244, appointment of a master to take an accounting was within the discretion of the trial court. In *Hefner* v. *Chozick,* 296 F.2d 595, an accounting was referred to the Court's auditor with direction to audit and state the account. The appellate court found this proper although no exceptional circumstances existed.

In *La Buy* v. *Howes Leather Co.,* 77 S.Ct. 309, 352 U.S. 249, 1 L.Ed 290, the Court held issues of detailed accounting might properly be referred to a master. In *Wilson* v. *Homestead Valve Mfg. Co.,* 217 F.2d 792, the action of the trial court in using a special master to examine records and report in summary form figures for the use of the trial judge was held commendable.

We believe counsel for the Government is overlooking the fact that the master is desired to save the Court from the burden of bookkeeping and accounting, where no special circumstances are required under the rules.

Respectfully submitted,

(signed) Gus Rinehart
GUS RINEHART,

Of

RINEHART, MORRISON & COOPER,
2320 First National Building,
Oklahoma City, Oklahoma,

ATTORNEY FOR PLAINTIFFS.

This is to certify that a true and correct copy of the within and foregoing Response to Objections to Appointment of Special Master was this 20th day of July, 1966, mailed to B. Andrew Potter, United States Attorney for the Western District of Oklahoma, Oklahoma City, Okla-

homa, and to Robert I. White, Attorney, Tax Division, Department of Justice, 416 U. S. Court House, Fort Worth, Texas.

(signed) Gus Rinehart

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	No. 9171
HONORABLE STEPHEN S. CHANDLER, Chief United States District Judge for the Western District of Oklahoma	)	

ORDER

Upon consideration of the application of the United States of America, petitioner herein, it is hereby ordered that any and all proceedings ordered to commence on December 5, 1966, before the Special Master appointed in the case of *Robert O. Burbridge, et ux* v. *United States of America* are hereby stayed pending action by this Court on the petition for a writ of mandamus, filed herewith by the United States.

(written by hand) Dated Dec 2, 1966.

(signed) David T. Lewis
JUDGE

A true copy!
TESTE:
Robert B. Cartwright, Clerk
By
(signed) William L. Whittaker
Chief Deputy Clerk

[APPENDIX]

EXHIBIT F

SEVENTH DAY, MARCH TERM, FRIDAY, MARCH 24th, 1967.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. HILL, Circuit Judges.

United States of America, Petitioner,	)	
9171 vs.	)	On Petition for
Honorable Stephen S. Chandler, Chief United States District Judge for the Western District of Oklahoma, and Robert O. Burbridge and Velma J. Burbridge, Respondents.	)	Writ of Mandamus.

The temporary stay order entered December 5, 1966, staying any and all proceedings before the Special Master appointed in the case of Robert O. Burbridge et ux vs. United States of America is hereby made permanent.

A true copy

Attest

(signed) William L. Whittaker

William L. Whittaker
Clerk, U. S. Court of
Appeals, Tenth Circuit

FILED
Mar 27 1967
VERA L. HOWARD
CLERK U. S. DISTRICT COURT
BY Josephine P. Gore
DEPUTY

EXHIBIT G

STATUTES INVOLVED

28 U.S.C., Section 1292: Interlocutory decisions.

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided,*

however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 727; July 7, 1958, Pub. L. 85-508, § 12 (e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.)"

28 U.S.C., Section 1651: Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 90, 63 Stat. 102.)"

Rule 53(b), Federal Rules of Civil Procedure: Reference.

"A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. As amended Feb. 28, 1966, eff. July 1, 1966."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 480

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

The petition for a writ of certiorari seeks review of an order of the United States Court of Appeals for the Tenth Circuit, entered on the United States' petition for a writ of mandamus, permanently staying any proceedings before the Special Master whom petitioner had appointed in the income tax refund case styled *Robert O. Burbridge, et ux.* v. *United States*, Western District of Oklahoma, Civil No. 9404 (Pet. App. x). The time of the United States for filing a response to the petition for certiorari has been

282-812—67

extended (first by the Clerk, and then by Mr. Justice White) to and including November 24, 1967.

On November 1, 1967, the government accepted the taxpayers' offer to compromise the *Burbridge* case. On November 10, 1967, petitioner, at taxpayers' instance, entered an order dismissing the case with prejudice.[1]

In view of this final disposition of the controversy between the taxpayers and the United States,[2] any issue as to the propriety of petitioner's reference of the *Burbridge* case to a Special Master, and the appellate court's order staying the reference, has become moot. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the order of the court of appeals, and remand the case to that court with instructions to dismiss the mandamus proceedings as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39–41; *Platt* v. *Minnesota Mining & Mfg. Co.*, 382 U.S. 456.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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[1] A certified copy of the order of dismissal is printed as Appendix A hereto and is being filed with the Clerk.

[2] On November 8, 1967, the State of Oklahoma, on behalf of its Tax Commission, filed a "Claim of Intervention" for the purpose of asserting a State tax claim against the taxpayers. No action was taken on the intervention question before dismissal.

APPENDIX A

In the United States District Court for the Western District of Oklahoma

Civil No. 9404—Filed Nov. 13, 1967

ROBERT O. BURBRIDGE, AND VELMA J. BURBRIDGE, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Dismissal with Prejudice and Order Thereon

DISMISSAL WITH PREJUDICE

Comes now the plaintiffs in the above captioned case and dismiss the above numbered and styled cause with prejudice against the filing of a future action thereon; each party to bear their own costs.

RINEHART, MORRISON & COOPER,
2320 First National Building,
Oklahoma City, Oklahoma.
By GUS RINEHART,
Attorneys for Plaintiffs.

ORDER

The dismissal is accepted and this cause is dismissed with prejudice and it is so ordered.

Dated this 10th day of November, 1967.

STEPHEN S. CHANDLER,
Chief Judge, U.S. District Court for the Western District of Oklahoma.

UNITED STATES OF AMERICA
Western District of Oklahoma, ss.

I, Vera L. Howard, Clerk of the U.S. Dist. Court for the West. Dist. of Okla. do hereby certify that the foregoing is a true and full copy of the original instrument as appears of record in my office.

Witness my hand and the seal of said court this 15 day of November, 1967

VERA L. HOWARD, *Clerk*
By CECIL A. QUALLS, *Deputy.*

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CHANDLER, UNITED STATES DISTRICT JUDGE, ETC. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 480. Decided January 15, 1968.

PER CURIAM.

Upon the respondent's suggestion of mootness and our independent examination of the papers, the petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Tenth Circuit is vacated. The case is remanded to that court with instructions to dismiss the mandamus proceedings as moot.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.